

**DRAFT**

Category	Proposed Additional Safeguards/Restrictions	Resolution of Issue Via the FCC's Recent Rulings
regulation continued)	Full imputation (price floors) for all PBCom services. (AT&T-Economides, pg. 28; MCI-Cornell, pg. 13)	The FCC rejected proposals that it review 272 affiliates' prices and profits to ensure that prices cover access charges and other costs, citing, in part, the "enormous administrative burden" on the Commission. FCC 96-489 ¶ 258
	PBCom should not be allowed to provide local or intraLATA service. (TURN-Long, pg. 13; CCTA-Kalut, pp. 7 & 23)	The FCC ruled that 272 affiliates are not prohibited from providing local exchange services in addition to interLATA services. FCC 96-489 ¶ 258  The FCC also rules that competition in the local market would not be harmed if a 272 affiliate offers local exchange services to the public that are similar to local exchange services offered by the BOC.
	Restrict PBCom from becoming a facilities-based LEC until effective local competition. (MCI-Cornell, pg. 15)	The FCC found that 272 affiliates can offer local exchange service without limitation on the nature of the facilities it uses to provide that service. FCC 96-489 ¶¶ 312-314
	Restrict PBCom to provide only local or intraLATA toll services it buys from Pac Bell (ORA-Elfin, pg. 32)	The FCC found that 272 affiliates can offer local exchange service without limitation on the nature of the facilities it uses to provide that service. FCC 96-489 ¶¶ 312-314
	Require PBCom to file an application to build facilities or buy or sell assets. (Sprint-Purkey, pg. 9-10)	The FCC found that 272 affiliates can offer local exchange service without limitation on the nature of the facilities it uses to provide that service. FCC 96-489 ¶¶ 312-314
	Require PBCom to file advice letters for introduction of new services and rate changes effective on 40 days notice. (Sprint-Purkey, pp. 10-11)	The FCC found no basis to conclude that 272 affiliates should be considered incumbent LECs, and it found that the danger of successful predation is small. These findings are not consistent with treatment as a "dominant" carrier. FCC 96-489 ¶¶ 312, 258

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Category	Proposed Additional Safeguards/Restrictions	Resolution of Issue Via the FCC's Recent Rulings
Access Charges	PacBell's access charges must be set no higher than economic cost before PBCom authorized to operate. (MCI-Cornell, pg. 13)	The FCC explained that they intend to address access charges in a separate proceeding. FCC 96-489 ¶ 258, 314
	PBCom can only buy access from PacBell tariff and not on contract basis. (Sprint-Purkey, pg. 15)	The FCC found that BOCs may provide volume and term discounts to their 272 affiliates just as they must for unaffiliated carriers. FCC 96-489 ¶ 257
Local Resale	The Commission should require Pacific Bell to provide verifiable measures of its performance in providing services and facilities to affiliated and unaffiliated carriers. (AT&T-Kergoll, pg. 12 & Economides pg. 28)	The FCC found that the existing accounting rules and biennial audit requirements are adequate protection against the potential for improper cost allocation, and that its enforcement authority under §§ 271(d)(6) and 208 are available to address potential discrimination in provisioning. FCC 96-489 ¶¶ 162, 257
Employees	No PacBell employee transfers to PBCom unless proven that PacBell is not harmed. (ORA-E:Ifin, pg. 43)	This issue is not explicitly addressed by the FCC, although its ruling with respect to the sharing of non-operational services would appear to be consistent with no bar on the transfer of employees.
Misc.	As condition of certification, develop a plan to ensure PacBell net income not reduced as a result of PBCom. Require public review before submitted to Commission. (ORA-E:Ifin, pg. 33)	This issue is not explicitly addressed by the FCC, although its refusal to promulgate additional accounting rules and restrictions would appear to go against this recommendation.

(END OF

**COMPARATIVE ADVANTAGE ANALYSIS****Advantages of PacBell and PacBell Comm**

<i>Advantages Derived from Former Monopoly</i>	<i>Limitations/Conditions</i>
Start with a ubiquitous network for local service and began (as of early 1996) with 100% of local service customers (See, e.g., 3 Tr. 440-441, Pitchford).	
Start with a name that is synonymous with local service; generally a good reputation because regulation ensured sufficient revenues to provide high quality service. (Ex. 65 at 73, Elfner; 2 Tr. 230, Jacobsen)	
Have valuable (and private) customer information derived from the billing they have done for all local service and for many long distance companies. (Ex. 65, p. 67, Elfner)	PacBell's agreements with long distance carriers may prevent them from using the long distance customer information without permission of the long distance carrier; parties are seeking restrictions on PacBell's ability to use long distance and other private information that could partly neutralize this advantage with respect to marketing of PacBell Comm services
Almost all residential customers still must contact PacBell for local service (3 Tr. 440-441, Pitchford); those who have a choice generally only can only get resale of PacBell's service, which offers limited price and features competition to PacBell	
Depending on the size and location of the business, most businesses have little or no choice of local service providers.	Some large businesses and government offices in major downtown areas have a choice of a facilities-based competitor.

<p>For resale of PacBell's local service, PacBell has the ability to provide less favorable treatment (<i>e.g.</i>, with respect to service ordering) to competitive carriers than PacBell Comm and its own retail customers, to the extent that regulators do not prevent such discriminatory treatment. (There is often a time lag for regulators to act and regulators are reluctant to get involved in complex commercial disputes.) (Ex. 65, pp. 9-10, 34, Elfner; ICG Op. Br. at 10-14).</p>	<p>Obvious discrimination will likely be detected by competitors and halted by regulators. But complex business practices (<i>e.g.</i>, service ordering) can allow for subtle discrimination that is difficult to detect and prove. (ICG Op. Br. at 10-14).</p>
<p>When competitors are able to use PacBell's unbundled network elements (UNEs), PacBell will have the same ability to provide less favorable treatment to competitors than it provides to PacBell Comm. (See above.)</p>	<p>(See above.)</p>
<p>Even for customers who have a choice for local service, a large portion will continue to contact PacBell first simply because of inertia (Ex. 65, p.65, Elfner; Ex. C-21, PB3006085).</p>	
<p>Because customers must get local service in order to get any telephone service, they are likely to call a local service provider first before they think about who to use for toll and long distance service (<i>See</i> Ex. 65, p.68, Elfner).</p>	
<p>PacBell receives a huge number of inbound calls from existing customers regarding changes to their service, such as ordering new features, changing their directory listing, or requesting a PIC change. These calls are marketing opportunities. (Ex. C-13, PB3007301, PB 3007303; Ex. C-100, pp. 6-7, Costa; Ex. C-21, PB3006085).</p>	

<p>PacBell has monopoly or at least significant market power for the following types of services: local, custom calling services, intraLATA toll. (D.96-03-020 at 53, 55; 10 Tr. 1204, Long).</p>	
<p>Customers are accustomed to providing personal and private information to PacBell in order to secure local service (e.g., social security number, driver's license number, how many people will be using phone and for what purpose, how many lines in the house). Unless regulators restrain such behavior, PacBell can ask these and other questions and gain valuable marketing information without the customer realizing that the information is serving only PacBell marketing purposes. (10 Tr. 1211-1212, Long; Ex. C-30, PB3001561; Ex. C-100, pp. 11-12, Costa).</p>	<p>TURN has asked the CPUC in this case to require PacBell to inform customers when information they are requesting is not necessary in order to obtain telephone service. (Ex. 101, p. 14, Long; Ex. C-100, pp.11-12, Costa).</p>
<p>PacBell has monopoly power over the access service competing long distance providers need in order to provide toll service. (Ex. 65, pp.72-73, Elfner; 10 Tr. 1204, Long; Ex. 99, p.12, Costa).</p>	<p>Effective regulation -- especially imputation and price floor requirements for PacBell Comm -- could at least partly neutralize this advantage</p>
<p>Ability to cross-subsidize PacBell Comm services if costs of services and assets (e.g., marketing services, value of PacBell name) are not imputed into PacBell Comm's costs and used in determining price floors. (Ex. 101, pp. 12-13, Long; Ex. 65, p. 18, 73, Elfner; 10 Tr. 1208-1209, 1214-1215).</p>	<p>Effective regulation (proper price floors) can neutralize this advantage</p>

## Advantages of AT&T

<i>Advantages Derived from Former Monopoly</i>	<i>Limitations/Conditions</i>
<b>Strong name recognition and even some confusion with some customers who think that AT&amp;T never stopped providing local service (1 Tr. 229-230, Jacobsen; Ex. 44, p. 17, Sofman).</b>	
<b>Residual market power with respect to some parts of the long distance market -- the basic toll and directory assistance services used by residential and small business customers (10 Tr. 1205, Long).</b>	
<b>Has an over 50% share of the overall long distance market (on a minutes of use basis) and has an even larger percentage of total presubscribed long distance customers in California. (9 Tr. 1103, Kargoll).</b>	<b>Unlike PacBell, long period of choice among competing providers makes it difficult to assess the extent to which existing market share reflects customers retained because of former monopoly status as opposed to customers won or retained through effective marketing</b>
<b>Has a customer base comparable in size to PacBell's customer base. (1 Tr. 129, Jacobsen).</b>	<b>Customers of long distance and toll services have fewer reasons to make inbound calls than customers of local service.</b>
<b>Has huge financial resources. (C-103, pp.17-18, Emmerson).</b>	<b>PacBell and SBC, when combined, will also have tremendous financial resources, but still not as large as AT&amp;T.</b>

**Advantages of Competitive Local Carriers (CLCs) In General**

<i>Advantages</i>	<i>Limitations/ Conditions</i>
Ability to choose the geographic areas and customer classes they serve with local service. (D.96-03-020 at 46).	Limited service offerings are often more a function of necessity than choice, since marketing and advertising become more efficient as scope of service area increases
Ability of their customers to obtain complete bundles of telecommunications service in a single call (E.g., 9 Tr. 1106-1107).	Large long distance carriers cannot yet do this if their local service is obtained from resale of PacBell. (FCC 96-489). Once PacBell Comm begins service, this advantage will be neutralized since PacBell will be able to jointly market a full bundle of PacBell/ PacBell Comm services. (Under TURN proposal, to obtain PacBell Comm's service, customer would have to be transferred to a separate sales staff at PacBell) (Ex. 101, p.13, Long).
Ability to target special prices and special promotions to a limited geographic area or class of customers. (Ex. 45, p. 16, Sofman).	Such targeted promotions are more costly than generalized prices and promotions, including the costs of specialized billing. This advantage is neutralized at least in part by PacBell's authority to enter into customer specific contracts with its customers (D.96-03-020 at 56-58); PacBell Comm would have the same authority.

**Attachment D  
List of Appearances**

**Applicant:** William H. Booth and David Discher, Attorneys at Law, for Pacific Bell Communications; and McCutchen, Doyle, Brown & Enersen, by Terry J. Houlihan and Gregory Bowling, for AT&T Communications of California, Inc.

**Protestants:** Peter A. Casciato, Attorney at Law, for Association of Directory Publishers; Goodin, MacBride, Squeri, Schlotz & Ritchie, by John Clark, Attorney at Law, for California of Long Distance Telephone Companies, Inc. (CALTEL); Alan Gardner, Glenn Senow, Cynthia Walker and Darleen Clark, for California Cable Television Association (CCTA); Blumenfeld & Cohen, by Stephen P. Bowen, Karen M. Potkul, and Christine A. Mailloux, Attorneys at Law, for MCI Telecommunications Corp.; Willam C. Harrelson, Attorney at Law, for MCI Telecommunications, Inc.; Renee Van Dieen, for Sprint Communications Company; and Lesla Lehtonen, Attorney at Law, for California Cable Television Association (CCTA).

**Intervenors:** Richard Purkey, for Cable Television Association (Sprint); Thomas J. Long, Attorney at Law, for The Utility Reform Network; and McCutchen, Doyle, Brown & Enersen, by Rebecca Lenaburg, Attorney at Law, for AT&T Communications of California, Inc.

**Interested Parties:** Prima Legal Services, by Lee Burdick, Attorney at Law, for Cox California Telecom, Inc. ; Carrington Phillip, Attorney at Law, for Cox California Telcom, Inc.; Roger P. Downs, for Cox California PCS, Inc.; Traci Bone, Joseph Faber, and Michael Morris, Attorneys at Law, for Teleport Communications Group; Bruce Holdridge, for ICG Access Services, Inc.; Dhruv Khanna, Sr., Attorney at Law, for Intel Corporation; Elaine M. Lustig and Kathleen S. Blunt, for GTE California, Inc.; Martin A. Mattes, Attorney at Law, for Intel Corporation and California Payphone Association; E. Garth Black, Mark P. Schreiber, and Sean P. Beatty, Attorneys at Law, for Roseville Telephone Company, Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Company, Sierra Telephone Company, Inc. and Winterhaven Telephone Company; Earl Nicholas Selby, Attorney at Law, for ICG Telecom Group (formerly ICG Access Services, Inc.); and Jerry Varcak, for Bank of America.

**Office of Ratepayer Advocates:** Rufus G. Thayer, Janice L. Grau, and James S. Rood, Attorneys at Law.

**Telecommunications Division:** Robert Benjamin and Charles Christiansen.

(END OF ATTACHMENT D)

# Case File

Before the  
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Bell Communications )  
for a Certificate of Public Convenience and )  
Necessity to Provide InterLATA, IntraLATA )  
and Local Exchange Telecommunications )  
Services Within the State of California )  
\_\_\_\_\_ )

A. 96-03-007

OPENING BRIEF OF THE  
CALIFORNIA CABLE TELEVISION ASSOCIATION

*REDACTED VERSION*



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January 31, 1997

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**Before the  
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Bell Communications	)	
for a Certificate of Public Convenience and	)	
Necessity to Provide InterLATA, IntraLATA	)	A. 96-03-007
and Local Exchange Telecommunications	)	
Services Within the State of California	)	
_____	)	

**OPENING BRIEF OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION**

The California Cable Television Association ("CCTA") hereby submits its opening brief, pursuant to the instructions issued by Administration Judge Walker in the above-captioned proceeding.

I. Introduction and Summary

This proceeding was opened by the application of Pacific Bell Communications ("PB Com") for authorization to provide long distance and local exchange services within the State of California, pursuant to Section 272 of the Telecommunications Act of 1996. Section 272, entitled "Separate Affiliate; Safeguards, provides that a Bell Operating company (including any affiliate) which is a local exchange carrier, may not provide in-region interLATA telecommunications services, unless it provides that service through one or more affiliates that are separate from any operating company

entity, and which meet certain structural and transactional requirements in Section 272 (b). PB Com is the Section 272 affiliate of Pacific Bell.

The separate subsidiary requirement, as well as the transactional safeguards of Section 272, attest to Congress' antitrust and anticompetitive concerns. Indeed, the Senate Report noted that:

This legislation authorizes the BOCs to engage in the ...provision of long distance service under certain conditions. The bill would replace the current antitrust prohibition with regulatory safeguards designed to prevent the BOCs from engaging in anti-competitive behavior.<sup>1</sup>

The concerns of Congress were not misplaced. PB Com's application has raised a number of issues, not only because it represents the BOC's entry into long distance, but also because the application includes a request for authorization to provide local service on a resale and facilities-basis, in conjunction with long distance services. The provision of these services by a Section 272 affiliate appeared to many in this proceeding, including CCTA, to violate the letter and intent of the structural separation requirement of the Act.

The evidence in this proceeding, elicited both in testimony and through cross-examination, convincingly indicates that there are substantial competitive, ratepayer and consumer interests which will be compromised if PB Com is authorized to provide these services in the manner in which it proposes. Despite the evidence in this proceeding, however, the recent ruling in the Federal Communications Commission's

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<sup>1</sup>See S. Rep. No. 23, 104th Cong., 1st. Sess. (1995), Regulatory Impact Statement, Senate Committee on Commerce, Science and Transportation, at 15 (Senate Report). See also, Ex. 94 at 15-16.

("FCC's") First Report and Order ("FCC Order"), Docket No. 96-149<sup>2</sup> , circumscribes the ability of this Commission to independently determine whether or not authority for the provision of local service bundled with long distance service should be granted or denied. This is because the FCC has determined that the provision of local and long distance services together does not violate the letter or intent of the Telecommunications Act.

The FCC Order does, on the other hand, provide for state commissions to regulate the 272 affiliate on a "dominant carrier" basis, and constrain 272 affiliates like PB Com from entering into certain relationships with its BOC affiliate. CCTA will accordingly evaluate the FCC's Order in relation to the evidence presented in this proceeding, and propose recommendations for appropriate regulation to be included in the authorization for PB Com's CPCN to protect the public interest (See Section VI *infra.*).

The CPCN which PB Com seeks here will not, in and of itself, allow PB Com to provide the services for which it requests authority. Pacific Bell's entry into the long distance market through its affiliate PB Com must first be authorized by the FCC, following consultation with the California Public Utilities Commission under Section 271 of the Telecommunications Act of 1996. In addition, Pacific and PB Com must be able to demonstrate that it is in compliance with the safeguards inherent in Section 709.2 of the Public Utilities Code (the "Costa requirements"). As discussed herein, the evidence

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<sup>2</sup>In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended; CC Docket 96-149, First Report and Order and Further Notice of Proposed Rulemaking, December 24, 1996

in this proceeding clearly indicates that the Costa requirements have not been met. Nevertheless, PB Com's CPCN authorization, should it be granted, must be effective no earlier than upon such date as it is determined that the appropriate BOC entity has met the Section 271 checklist and Costa requirements, pursuant to the investigation in the Managing Commissioner's Ruling proceeding.<sup>3</sup>

II. The Evidence In This Proceeding Demonstrates that PB Com and Pacific Have Not Complied With the Costa Bill Safeguards; The CPCN Cannot Be Granted Until Such Safeguards Have Been Determined to Have Been Met In the MCR, Pursuant to Public Hearing

The Costa Bill, codified at California Public Utilities Section 709.2, provides competitive safeguards in the form of prerequisite findings that the Commission must make before it can authorize entry into the long distance market by a Telesis affiliate. These findings are scheduled to be determined in the Managing Commissioner's Proceeding, a proceeding scheduled specifically for the purpose of finding compliance or non-compliance with the Costa safeguards. If and when it is determined that the safeguards of Costa have been complied with (as well as compliance with other requirements of the Telecommunications Act and Commission regulations), a CPCN may be granted, albeit with certain other restrictions, as discussed herein, to protect the public interest.

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<sup>3</sup>While Pacific Bell is not a party to this proceeding, PB Com has apparently recognized the integrated nature between it and Pacific, and between its success and the ability of Pacific to engage in certain practices. PB Com has filed testimony, submitted on behalf of Pacific, the purpose of which is to represent the requirements of Pacific, for example, to engage in joint marketing and to use customer's CPCN information. Any Decision by the Commission in this proceeding must, therefore, necessarily take the practices of Pacific into consideration in its deliberations.

The Costa requirements include a finding that:

there is "fair, nondiscriminatory and mutually open access to exchanges;

there is "no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber information or unfair use of customer contacts generated by the local exchange telephone corporation's provision of local exchange telephone service;

there is "no cross-subsidization of intrastate interexchange service by requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs"; and

there is "no substantial possibility of harm to competitive intrastate interexchange telecommunications markets from LEC entry.

At this point, and as discussed in detail herein, it must be concluded that the evidence in this proceeding shows that compliance with the Costa requirements has not been met.

III. The Evidence in this Proceeding Has Elicited Information Which Clearly Demonstrates That PB Com's Proposal will Impair Public Interest Concerns Regarding the Development of Competition, and Ratepayer and Consumer Interests, in Violation of Costa Requirements and the Telecommunications Act of 1996

The evidence in this proceeding shows that, rather than operate as competitors, Pacific Bell and PB Com will act in concert to ensure PB Com's success, as well as the success of their parent company, Pacific Telesis ("Telesis"). For example, PB Com estimates that 50-60 percent of its interLATA services will be sold not by PB Com, but

rather by Pacific Bell, through its joint marketing activities.<sup>4</sup>

<sup>5</sup> This symbiotic relationship between PB Com and the incumbent local exchange service provider, Pacific Bell, impacts the public interest in ensuring that competition exists in the local and long distance markets, raises concerns that PB Com's success will be assured at the expense of the Pacific Bell ratepayer, and impacts concerns that consumer protections, such as CPNI privacy rules and equal access provisions, will be sacrificed.

A.  Serious Ratepayer Concerns Are Raised by PB Com's Proposal

Pacific Bell and PB Com do not intend to be competitors; Pacific Bell will sell PB Com services, and PB Com will sell Pacific's local service in bundled offerings<sup>6</sup> In fact, the companies estimate that over 50% of PB Com's customers will be obtained through the marketing efforts of Pacific Bell.<sup>7</sup>

These marketing efforts alone raise the question of the "arms length" relationship between Pacific and PB Com. More serious, however, is the evidence in this proceeding that shows that Pacific Telesis, Pacific Bell, and PB Com have engaged in a marketing strategy to segment customers between the affiliates according to their

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<sup>4</sup>See Response to the Coalition's Third Set of Data Requests to Pacific Bell Communications, Data Response 23.

<sup>5</sup> Exs. C-14; C-21.

<sup>6</sup> Ex. C-14, C-16, Tr. Vol 2, Jacobson, PB Com at 274-275.

<sup>7</sup> Id.,

“value”. High value customers will be marketed PB Com services, and provided superior customer service, and low value customers, such as wholesale customers, will be marketed Pacific Bell services.<sup>8</sup> PB Com has been identified in discovery documents produced by Pacific Telesis and Pacific Bell as the “retail” subsidiary<sup>9</sup> This strategy, which essentially reduces Pacific Bell to a wholesale provider, is not designed to maximize the potential of either Pacific Bell or PB Com, but rather, to maximize the value of Telesis. It also strategically allows Pacific Bell, or Telesis, to provide retail services through PB Com, and escape the requirement of having to provide the service to its wholesale customer on a resale basis, as required by this Commission and the Telecommunications Act.

This segmentation of the market into high value customers and low value customers raises serious implications. It provides Pacific Bell the ability to evade providing certain local services on a wholesale basis, and the ability to discriminate in the quality of service provided to customers designated as high value vis a vis customers designated as low value. For example, lifeline customers might be marketed Pacific Bell services, and actually pay higher rates for local service than customers who receive local service in a bundled package of local and long distance services from PB Com.<sup>10</sup>

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<sup>8</sup> Ex. C-43; Tr. Vol 4, Pitchford, PB Com at 463-464.

<sup>9</sup> Tr. Vol. 4, Pitchford, PB Com at 463-464.

<sup>10</sup> Id.

More ominously, Pacific has recently complained that the entry of new local service providers will compromise its rate-base, in the Franchise Impact phase of the Local Competition proceeding. Under the proposal before the Commission here, Pacific Bell's more profitable ratebase will be deliberately migrated to a separate Telesis affiliate. Pacific maintains that its own migration of its own customers to PB Com constitutes "competitive loss", and that revenues "lost" to PB Com should not be considered in any franchise impact considerations<sup>11</sup>. Amazingly, Pacific maintains this position despite its intention to refold PB Com back into Pacific Bell once the Section 272 separate subsidiary requirement expires! Thus Pacific Bell is arranging its own rather temporary "franchise impact" for which it expects compensation, in spite of the fact that the existence of PB Com will serve to retain Telesis customers, allow Pacific to enter the long distance market, and contribute new forms of telecommunications revenue to the Telesis organization.

B. Consumer Interests, Such as the Protection of CPNI, and Equal Access to Carriers of the Consumer's Choice, Will Be Impaired By PB Com's Proposals

*1. CPNI Protections Are Seriously Threatened by the Proposals in this Proceeding*

As testified by TURN witness Long,

residential consumers in particular (and some business customers) have an interest in controlling the release and use of private information about themselves. Customers should not be asked to reveal private information unless they are made aware of their right to decline to provide such

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<sup>11</sup> Tr. Vol. 2, Jacobson, PB Com at 237, Vol 4, Pitchford, PB Com at 469.



Pacific Bell for marketing purposes, for the benefit of Pacific Bell's affiliates.<sup>16</sup> There is no plan to inform the customer that he or she does not have to consent to the access of the information, or that consent is required in order to obtain service.<sup>17</sup>

Pacific is also engaged in other schemes to obtain release of CPNI. For example, Pacific Bell is considering mailing out documents to customers which state that if the customer doesn't want his or her CPNI used, the customer would have to so indicate and mail the document back to Pacific Bell.<sup>18</sup> A customer will be presumed to have waived his or her protection of CPNI unless they affirmatively indicate that they would like their CPNI to remain private,<sup>19</sup>

The methods proposed by Pacific and PB Com to obtain CPNI releases for the use of both entities open the door for violations of regulations regarding the use of CPNI. A testimony to the interest in privacy by the citizens of California is Section 2891 of the California Public Utilities Code, which provides that no telephone or telegraph corporation shall make available to any other person or corporation, without first obtaining the residential customer's or subscriber's consent, in writing, of any of a number of subscriber information, such as calling patterns, access numbers, credit or financial information, or demographic information.

This code provision gives a privacy status to customer proprietary information,

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<sup>16</sup> Tr. Vol. 2, Jacobson, PB Com at 215-216, Ex. C-12.

<sup>17</sup> Id. at 225.

<sup>18</sup> Id. at 219-220.

<sup>19</sup> Id.

which the customer must affirmatively release if the company is to access it. In contrast to the statute, under Pacific's proposal, if a customer does not affirmatively inform Pacific Bell that it wishes to retain this protection, the protection of the statute is forfeited.

In addition, Section 709.2 requires that the Commission find that there is no anticompetitive behavior by Pacific Bell before authorizing entry into the long distance market, including unfair use of subscriber information. The methods Pacific is intending to use to gather CPNI demonstrates of anticompetitive behavior in this regard. In addition, Pacific Bell's use of its monopoly position as the provider of basic local services to benefit its affiliates in the realm of CPNI information calls into question whether or not these actions violate non-discrimination provisions of the Telecommunications Act. Section 272(c)(1) provides that

*In its dealings with its affiliate described in subsection (a), a Bell Operating Company...may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities and information, or in the establishment of standards;*

To comply with this section of the Act, it is only reasonable that as the incumbent monopoly provider, Pacific's release of CPNI information must be obtained for the benefit of all service providers, or not at all. Because the evidence indicates that Pacific Bell and its affiliates will not comply with this requirement unless the Commission specifically endorses it, the Commission must clearly require compliance with the nondiscrimination provisions of the Act, as well as indicate that non-compliance is an anticompetitive activity pursuant to the Section 709.2.

## *2. Equal Access Provisions Are At Risk*

Equal access provisions are also consumer protection provisions designed to ensure that consumers are informed that they have a choice of long distance providers, and requires the local service provider to connect a customer to any long distance carrier the customer selects. Although Section 251 (g) requires equal access, the testimony in this proceeding indicates that Pacific's commitment to equal access provisions is less than sincere:

**Question:** Isn't it true that Section 251(g) of the Telecommunications Act of 1996 requires Pacific Bell to continue to observe the same equal-access obligations that it was required to follow before the enactment of TA'96?

**Answer:** Well, this certainly has been an issue that...of contention before the FCC, and you know, parties have interpreted this in many different ways. But its our impression that there is still a requirement for Pacific Bell to connect a customer to any carrier that the customer wants.

The equal access requirement, you know, also says that Pacific Bell or RBOCs should not discriminate against any long-distance company.

But we think that the way that the Telecom Act addresses joint marketing, it says that joint marketing is not discriminatory or doesn't violate nondiscriminatory provisions, and so we believe that, you know, this is being rationalized and we're waiting for the FCC's decision to see how they come out on this.

**Question:** Well, my question was, does it require it to...does Section 251)g) require Pacific Bell to have the same equal access requirement that it did before the enactment of TA'96?

**Answer"** Well, as I stated before, I believe there is a requirement for Bell to connect a customer to any carrier they want. But I believe that in its ruling on joint marketing the FCC will rationalize the statement on joint marketing that said it's not discriminatory and the statements in the section you cited about equal access.

**Question:** As the statute reads now, Pacific Bell is required to follow the same equal-access obligations or observe the same equal-access obligations it was required to before the enactment of TA'96; is that correct? It's "yes" or "no".

**Answer:** I don't think its that simple, because the statute also says that the joint marketing is not discriminatory. And so the FCC is going to have to interpret how those two sections of the Telecom Act will be played out.<sup>20</sup>

In fact, the evidence in this proceeding indicates that Pacific plans to inform the customer of his or her choice of carriers in a manner that manages at best to blur, or at worst, ignore, both the equal access requirements and CPNI protections, by stating to the customer

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Another opportunity for Pacific to render equal access requirements meaningless is when a customer calls to change interLATA carriers from one interexchange carrier, such as MCI, to another, such as Sprint. Despite the fact that Sprint would have engaged in costly marketing and advertising efforts to obtain this customer, Pacific will have the opportunity to present the customer with an aggressive campaign to switch to PB Com.

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<sup>20</sup> *Id.* at 164-166.

<sup>21</sup> Ex. C-13, C-21.